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Supreme Court, U.S.
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No. 98-988

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ROBERT N.C. NIX, et al.,

Petitioners,

v.

ROLF LARSEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This is an action, among other claims, by a former justice of the Pennsylvania Supreme Court against seven other justices of the Supreme Court (three now retired) and two officials of the Administrative Office of Pennsylvania Courts, seeking declaratory and injunctive relief, voiding the action of revoking respondent Rolf Larsen's retirement medical benefits, and awarding him damages for medical expenses incurred from June 4, 1994, to date of judgment.[1]

Petitioners are Justices Flaherty, Zappala, Cappy and Castille, and former Justices Nix, Papadakos and Montemuro, court administrator Nancy M. Sobolevitch, and manager of human resources of the Court Administrator's Office, David A. Frankforter.

ADDITIONAL STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983:

"Every person who under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . "

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[1]Mr. Larsen has filed a petition for writ of certiorari, No. 98-1038, seeking review of the decision granting Senators of the Commonwealth of Pa., absolute legislative immunity as to impeachment proceedings described *infra*. *Larsen v. Senate*, 152 F.3d 240 (3d Cir. 1998).

COUNTER STATEMENT OF THE CASE

Nature of Action

By letter dated June 17, 1994, petitioners informed Mr. Larsen that, as of the close of business on June 3, 1994, he had become ineligible to receive retirement medical benefits.

Mr. Larsen alleges that revoking these benefits violated his rights under the Impairment of Contracts and Due Process clauses. Mr. Larsen alleges that statements made by him, protected under the First Amendment, were substantial or motivating factors in the decision to revoke his benefits.

Petitioners are not entitled to qualified immunity for revoking Mr. Larsen's benefits, because it was clearly established as of June 17, 1994, and reasonable officials would have known, that revoking Mr. Larsen's benefits violated his constitutional rights to such benefits.

Counter Statement of Facts

In November 1973, Mr. Larsen was elected to a ten-year term as a judge on the Court of Common Pleas, Allegheny County, Pennsylvania, and served there from January 1974, to January 1978.

As of January 1974, one of the terms and conditions of judicial service was a medical plan that provided lifetime medical benefits for members of the judiciary with 20 or more years of service, regardless of age.

In November 1977, Mr. Larsen was elected to a 10-year term as a justice on the Supreme Court of Pennsylvania. In November 1987, Mr. Larsen won a retention election for an additional 10-year term beginning in January 1988.

On or about December 12, 1989, the Pennsylvania Supreme Court adopted a new medical insurance plan for members of the state judiciary. The new plan provides lifetime benefits for members of the judiciary with 10 or more years of service, regardless of age.

Benefits under the new plan include "Fully State-Paid Basic & Specialized Coverage." "Basic" coverage includes hospital and medical expenses, etc. "Specialized" coverage includes dental, vision, hearing and prescription drug expenses.

As of December 12, 1989, Mr. Larsen had served as a member of the judiciary for over 10 years. As a result, Mr. Larsen's benefits vested as of December 12, 1989, and he was entitled to "Fully State-Paid Basic & Specialized Coverage" for life upon separation from the judiciary.

On October 14, 1992, the Supreme Court, by Justices Zappala and Cappy, with Justice Papadakos dissenting, in a disciplinary matter, reprimanded Mr. Larsen for creating, without improper motive, an appearance of impropriety. *Matter of Larsen*, 532 Pa. 326, 616 A.2d 529 (1992).

On November 24, 1992, in the above disciplinary matter, Mr. Larsen filed and served a "Petition for Reargument" and a "Petition for Disqualification and Recusal of Justice Zappala and Justice Cappy." Mr. Larsen filed and served supplemental and second supplemental petitions on December 14, 1992, and January 7, 1993, respectively. The petitions (among other things) alleged relevant acts of impropriety by Justices Zappala and Cappy. The nature of the acts alleged against Justices Zappala and Cappy required them to recuse themselves in the disciplinary matter against Mr. Larsen.

The petitions also alleged (among other things) acts of

impropriety by Chief Justice Nix, including that he improperly interfered in the pending trial in *Commonwealth of Pennsylvania v. David Lee Yohn*, and that the Supreme Court, including Justices Zappala and Cappy, improperly handled Yohn's petition for allowance of appeal over the course of three and one-half years, eventually denying Yohn's petition. *See, Yohn v. Love, infra*. The improper handling of the Yohn petition required Justices Zappala and Cappy to recuse themselves in the Larsen disciplinary matter.

The petitions also alleged that, despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken, nor were any charges brought, against Chief Justice Nix.

In January 1993, Rep. Christopher K. McNally filed a Petition in the Pennsylvania House of Representatives ("House"), calling for Mr. Larsen's impeachment, and accusing him of violations of the Code of Judicial Conduct.

On May 18, 1993, the electorate in the Commonwealth of Pennsylvania adopted an amendment to Article V, § 16(b), of the Pennsylvania Constitution, changing the judicial discipline system, effective August 18, 1993.

On October 28, 1993, Mr. Larsen was charged with criminal conspiracy and 28 other violations of the Pennsylvania Controlled Substances Act, alleging that he had obtained medically needed prescription medications (tranquilizers) for his own use, whereby his personal physician issued prescriptions in the names of other persons (with their consent) to protect his privacy. That same day, the Supreme Court relieved him from all judicial duties (suspended), but he continued to receive his full salary and all health and medical benefits. See page 25 *infra* for legal significance.

On November 23, 1993, the House adopted House Resolution No. 205, authorizing its judiciary committee to investigate conduct allegedly committed by Mr. Larsen. After public hearings and investigation, the judiciary subcommittee on courts issued a report and recommendation.

As of January 1994, Mr. Larsen had served as a member of the judiciary for 20 years.

On March 10, 1994, the Judicial Conduct Board filed an application with the Court of Judicial Discipline for an interim order requesting the suspension of Mr. Larsen without pay. On March 25, 1994, the Court of Judicial Discipline denied the application.

On April 9, 1994, following trial in the Court of Common Pleas, Allegheny County, PA, Mr. Larsen was convicted of two counts of criminal conspiracy with his doctor, Earl A. Humphreys, M.D., the unindicted co-conspirator, to issue medically needed prescriptions (tranquilizers) in the names of third parties (with their consent) so as to protect Mr. Larsen's privacy. Privacy was medically necessary for successful treatment. Mr. Larsen was acquitted of all other charges.

DEA revoked Dr. Humphreys's certificate to write prescriptions for controlled substances, but this decision was reversed and remanded by the Third Circuit for a new hearing directing that the issue of patient privacy be taken into account. *Humphreys v. D.E.A.*, 96 F.3d 658 (3d Cir. 1996).[2] Dr. Humphreys has since died.

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[2]Paradoxically, the Allegheny County judge who presided over Mr. Larsen's criminal trial, W. Terrance O'Brien, did not permit Mr. Larsen to introduce any evidence of privacy to show, among other things, lack of criminal intent. Appeal on the matter is pending.

On April 22, 1994, the House subcommittee on courts recommended to the entire House a resolution to impeach Mr. Larsen.

On May 18, 1994, House Resolution 324 was introduced, listing seven Articles of Impeachment, and was adopted by the House on May 24, 1994.

As of June 1994, Mr. Larsen was in the seventh year of his second term and next in line to be Chief Justice of Pennsylvania.

On June 3, 1994, upon the application of the Judicial Conduct Board, the Court of Judicial Discipline issued an order directing the suspension of Mr. Larsen without pay.

On June 6, 1994, the Senate received the Articles of Impeachment from the House Managers, and appointed an impeachment committee ("the Committee").

On June 13, 1994, in the criminal action, Mr. Larsen was sentenced to probation, community service, removal from office,[3] and payment of costs. On August 5, 1996, the Superior Court of Pennsylvania vacated sentence and remanded for sentencing based on only one conspiracy count, not two. In May 1997, Judge O'Brien imposed the same sentence as he originally imposed on June 13, 1994. The matter is pending in Superior Court.

On June 17, 1994, Mr. Frankforter, on behalf of himself, Ms. Sobolevitch and Supreme Court justices, notified Mr.

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[3]In Pennsylvania, if a public official is convicted of "an infamous" crime, then he may be removed from office. The criminal trial judge "deemed" Mr. Larsen's criminal conspiracies to be an "infamous" crime.

Larsen that he would no longer receive "Fully State-Paid Basic & Specialized Coverage" as of the close of business on June 3, 1994.

On August 8, 1994, while the Senate was not in session, the Senate Committee began evidentiary hearings on the Articles of Impeachment. The hearings took place in the Senate chamber in the Capitol in Harrisburg, PA. Evidentiary hearings were held on 17 separate days, and concluded on September 9, 1994.

The Committee pre-trial and the Senate post-trial refused Mr. Larsen's requests that a standard of proof be established and that rules of evidence be adopted [A121-A122, ¶¶ 58(d) and 58(e)]. The Senate concluded it could decide the impeachment charges on the following source of the "evidence:" "Everybody knows what they know. They know from wherever they found it."

On October 4, 1994, the Senate convicted Mr. Larsen on Article II, but acquitted him on the other six Articles, including Article VI, which included the conspiracy count on which he was convicted in the Allegheny County criminal proceeding. The Senate then voted unanimously to bar Mr. Larsen from holding any office of trust or profit in Pennsylvania.

Other members of the judiciary, who qualified for lifetime benefits and were later removed from office under similar circumstances, continue to receive state-paid medical benefits, whereas Mr. Larsen does not.

Mr. Larsen's payments for his present medical coverage is much higher than if he was participating in the Commonwealth's group plan and his present benefits are significantly lower.

On May 5, 1995, the U.S. District Court for the Eastern District of Pa. granted the writ of habeas corpus sought by David Lee Yohn. *Yohn v. Love*, 887 F.Supp. 773 (E.D.Pa.), affirmed, 76 F.3d 508 (3d Cir. 1996).

The district court said: Chief Justice Nix's interference in Yohn's trial was "particularly egregious" and "nothing other than a gross abuse of the jurisdictional limits of his power;" the "Supreme Court's handling of [Yohn's] petition [for allocatur] was, at the very least, unprincipled;" and, "several holds were placed on the petition, in large part to avoid the embarrassment of airing the internal disputes of the Supreme Court publicly."

Procedural History

On September 13, 1995, Mr. Larsen filed his complaint in this action under 42 U.S.C. § 1983[4] against petitioners

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[4]Petitioners' counsel's comment at p. 5, n.2, that Mr. Larsen brought suit under § 1983 rather than under state contract law "to qualify for counsel fees" is misleading, incorrect and gratuitous. The comment wrongly suggests that Mr. Larsen's counsel made the statement, whereas in fact, the statement was baseless speculation made by defense counsel. Mr. Larsen was entitled to pursue his remedies under federal constitutional law, especially since the court of last resort in any action in state court, that is, the Supreme Court of Pennsylvania, included and still includes a majority of the justices he was suing. Moreover, these same justices have supervisory powers over all the Pennsylvania lower court judges, which powers included assigning all judges to particular trial divisions, assigning particular judges to particular cases, appointing all administrative judges, and appointing senior judges. Each individual justice may veto any of these appointments by asserting what is called a "personal" (no reason need exist nor be given to the other justices to accomplish this veto).

and others. On February 26, 1996, Mr. Larsen filed his amended complaint. On March 18, 1996, petitioners moved to dismiss on various grounds.

On February 28, 1997, the district court denied petitioners' motions to dismiss based on qualified immunity. *Larsen v. Senate*, 955 F.Supp. 1549 (M.D.Pa.), on reconsideration, 965 F.Supp. 607 (M.D.Pa. 1997).

On August 11, 1998, the court of appeals affirmed in part and reversed in part the district court's orders as to qualified immunity of petitioners. *Larsen v. Senate*, 154 F.3d 82 (3d Cir. 1998). On September 28, 1998, the court of appeals denied the petition of the justices for rehearing. On December 18, 1998, the instant petition was docketed in this court.

REASONS WHY THE PETITION FOR A WRIT SHOULD BE DENIED

This court should not review the question of qualified immunity because the Third Circuit decision in *Larsen v. Nix et al.*, correctly applied the "clearly established" standard, consistent with recent decisions of this court, and correctly applied the Supreme Court of Pennsylvania's jurisprudence on entitlement to vested retirement benefits.

This court should not review the Third Circuit decision because the court of appeals did not render "a decision in conflict with a decision of another court of appeals on the same important matter." This is in contrast to two cases cited by petitioners [p. 7] in which certiorari was granted this term, where the Fourth and Ninth Circuits reached different results on the "same important matter." *Berger v. Hanlon*, 129 F.3d 505, 511 (9th Cir. 1998), and *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998)(en banc), *cert. granted* and

actions consolidated, 119 S.Ct. 443 (1998).[5]

Petitioners are confused; they are distorting and twisting the case law in order to make this case fit into one of the "compelling reasons" why this court will grant a petition for review, that is, conflicting decisions among the circuits "on the same important matter." See, Supreme Court Rule 10(a). Petitioners have not cited a decision from another court of appeals that is in conflict with the decision in this case.

Petitioners' "split-between-the-circuits" rationale for granting certiorari is flawed for two reasons. First, the purported holdings of the Fourth, Sixth and Eleventh Circuits are miscited, and second, the decision of the Third Circuit in this action does not conflict with the purported or actual holdings of any circuit. Moreover, petitioners' discovery of the purported conflicts is a "Road to Damascus" experience on their way to this court. Petitioners failed to cite the purported conflicting circuit court holdings below, even in their petition for rehearing in the Third Circuit. Petitioners did not argue in the district court or the court of appeals that the "clearly established" standard requires decision by this court, the Third Circuit, or the Supreme Court of

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[5]The "same important matter" is whether the Fourth Amendment right to be free from unreasonable search and seizure was clearly established to include searches with media present. *Berger* held agents were not entitled to qualified immunity, *Wilson* held police officers were entitled to qualified immunity. This issue has received much attention by the courts of appeals, which was likely a factor in this court's decision to grant the writs of certiorari. *Berger* cited *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), *Stack v. Gillian*, 96 F.3d 159 (6th Cir. 1996), *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), and the panel decision in *Wilson*, 110 F.3d 1071 (4th Cir. 1997). *Berger* was decided (11/13/97) before *Wilson* was decided *en banc* (4/8/98).

Pennsylvania.

Petitioners assert (p. 6) that "The Fourth, Sixth, and Eleventh Circuits, for example, have adopted a 'bright line' test, holding that an individual's rights are "clearly established" only when a materially similar case has been decided by the [Supreme] Court, the Court of Appeals of the respective circuit, or the highest court in the state where the alleged wrongdoing took place [emphasis supplied]."

The actual holding of the Fourth Circuit is:

> ". . . the fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless 'clearly established' for qualified immunity purposes and that 'clearly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked. The law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state."

Wilson, 141 F.3d at 114, citations and internal quotations omitted.

The actual holding of the Sixth Circuit is:

> "*Ordinarily*, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court or Sixth Circuit precedent [emphasis supplied]."

Cullinan v. Abramson, 128 F.3d 301, 311 (6th Cir. 1997).

The actual holdings of the Eleventh Circuit are:

> "We can imagine an exceptional case where 'the words of a federal statute or federal constitutional provision will be specific enough to establish law applicable to particular circumstances clearly and to overcome qualified immunity *even in the absence of case law* [emphasis supplied].'"

Santamorena v. Georgia Military College, 147 F.3d 1337, 1340 n.4 (11th Cir. 1998), citing *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1150 n.4 (11th Cir. 1994)(en banc). The Eleventh Circuit has also held:

> "In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose."

Jenkins v. Talladega City Bd of Ed., 115 F.3d 821, 827 n.4 (11th Cir.1997), citations and internal quotations omitted.

The Third Circuit's decision in this action lacks a holding on the issue, and therefore cannot be considered to be a decision in conflict with any other court, within the meaning of Supreme Court Rule 10(a). Moreover, the decision of the Third Circuit is well-grounded in decisions of this court[6], the

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[6]The Third Circuit decision relied upon: *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977) [A19], *Mississippi v. Miller*, 276 U.S. 174 (1928) [A18], and *Fisk v. Police Jury of Jefferson*, 116 U.S. 131 (1885) [A19], for the right that one's contract cannot be impaired; *Board of Regents v. Roth*, 408 U.S. 564 (1972) [A22], and *U.S. Trust Co., supra* [A22], for the right to due process before deprivation of a contractual right;

Third Circuit[7], and the Supreme Court of Pennsylvania.[8]

Contrary to petitioners' suggestion (pp. 6,7,13), the Third Circuit did not hold that dicta was clearly established law. The Third Circuit [A20-A21, n.13] merely marshalled dictum in further support of its conclusion that medical benefits are to be treated in the same manner as other retirement benefits,

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and, *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977) [A26], and *Givhan v. Eastern Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) [A27], for the right to be free from retaliation for protected speech.

[7]The Third Circuit relied upon its own decisions: *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995), and *Kelly v. Borough of Sayreville*, 107 F.3d 1073 (3d Cir. 1997) [A22], for the right to due process before deprivation of property rights; and, *Feldman v. Philadelphia Housing Auth.*, 43 F.3d 823 (3d Cir. 1994) [A26], *In re City of Philadelphia Lit.*, 49 F.3d 945 (3d Cir. 1995), *Sheppard v. Beerman*, 94 F.3d 823 (3d Cir. 1996) [A27], *Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997) [A28], and *Bradley v. Pittsburgh Bd. of Ed.*, 913 F.2d 1064 (3d Cir. 1990) [A29], for the right to be free from retaliation for protected speech.

[8]The Third Circuit relied upon Supreme Court of Pennsylvania decisions, in holding that Mr. Larsen had a vested contractual right to retirement medical benefits: *Glancey v. Com. State Retirement Bd*, 530 Pa. 520, 610 A.2d 15 (1992), *Bellomini v. State Retirement Board*, 498 Pa. 204, 445 A.2d 737 (1982), *Harvey v. Allegheny County Retirement Board*, 392 Pa. 421, 141 A.2d 197 (1958), *Wright v. Allegheny County Retirement Bd*, 390 Pa. 75, 134 A.2d 231 (1957) [A13], *Zimmerman v. Officers & Employees Retirement Board*, 501 Pa. 293, 461 A.2d 593 (1983) [A15], *Ass'n of Pa. State College & Faculties v. State System of Higher Education*, 505 Pa. 369, 479 A.2d 962 (1984) [A17], and *McBride v. Allegheny County Retirement Board*, 330 Pa. 402, 199 A. 130 (1938) [A19].

that is, they are "materially similar" or are "manifestly included within more general applications of the core constitutional principle invoked." Thus, the Third Circuit's approach was consistent with what petitioners say the law is in other circuits.

If a so-called "bright-line" test is applied, requiring precedent of a state's highest court in "materially similar" cases, that standard was met here, because the Supreme Court of Pennsylvania has created a "bright line" whereby a vested contractual right to medical benefits may not be impaired by law enacted after vesting.

Third Circuit application of "clearly established" standard is consistent with the law of this court and of its sister circuits

Qualified immunity protects a governmental official from liability for damages for acts taken in performance of his discretionary functions if his conduct has not violated "clearly established" rights of which a reasonable person would have been aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Anderson v. Creighton, 483 U.S. 635, 640 (1987), amplified *Harlow*, and is now the polestar of the "clearly established" standard, and said:

> "A right is 'clearly established' for qualified immunity purposes only if '[t]he contours of the right' are sufficiently clear that a reasonable official would understand that what he is doing violates that right."
>
> ". . . the 'clearly established' standard does not require that 'the very act in question has previously been held unlawful.'"

Anderson has been applied, for examples, in *Carver v. Foerster*, 102 F.3d 96 (3d Cir. 1996); *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996); *In re City of Philadelphia Lit.*, 49 F.3d 945 (3d Cir. 1995). *Acierno v. Cloutier*, 40 F.3d 597 (3d Cir. 1994); *Good v. Dauphin Cty. Services*, 891 F.2d 1087 (3d Cir. 1989).

The Third Circuit decisions in this case and cases above [A10-11] are consistent with recent decisions of this court, including *Crawford-El v. Britton*, 118 S.Ct. 1584 (1998)[9], and *United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 1227 (1997)(equating the "clearly established" immunity standard in civil law with the "fair warning" standard in criminal law).

The Third Circuit decisions in this case and cases cited above, applying the "clearly established" standard, are consistent with the decisions of the courts of appeals cited by petitioners (although petitioners' authority is not on point with this case). *Berger, supra* (Fourth Amendment, applying only *Harlow*); *Wilson, supra* (Fourth Amendment, applying *Anderson*); *Santamorena, supra* (in action based on rape by a student of another student at state military college, Fourteenth Amendment Due Process right was not clearly established that the voluntary custodial arrangement between school and student gave rise to a constitutional right to protect students); *Lassiter, supra* (under Fourteenth Amendment Due Process, not clearly established that university vice president had property interest in his position, applying *Anderson*, and making reference to, but not

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[9]Petitioners' contention that this action should be remanded because the Third Circuit did not cite *Crawford-El*, is misplaced. *Crawford-El* held that plaintiff need not adduce clear and convincing evidence of improper motive to defeat official's summary judgment motion claiming qualified immunity.

applying, "bright-line" test); *Horne v. Coughlin*, 155 F.3d 26, 30 (2d Cir. 1998)(in prisoner action, law not clearly established under Fourteenth Amendment Due Process or Eighth Amendment, applying only *Harlow*, but not "bright-line" test); *Brewster v. Bd of Ed of Lynwood*, 149 F.3d 971, 977 (9th Cir. 1998) (teacher's rights under First Amendment and Fourteenth Amendment Due Process were not clearly established, applying *Anderson*, but not "bright-line" test); *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997), *cert. granted*, 119 S.Ct. 39 (1998)(Fourth and Fourteenth Amendment rights in search of and interference with lawyer representing grand jury witness, applying *Anderson*, but not "bright-line" test); *Harris v. Roderick*, 126 F.3d 1189, 1196-98 (9th Cir. 1997)(Fourth Amendment excessive use of force, no reference to *Anderson* or "bright-line" test); *Jenkins v. Talladega City Bd of Ed., supra*, 115 F.3d at 823 (Fourth Amendment search of elementary school students, applying *Anderson*, but not "bright-line" test); *Wilson v. Meeks*, 52 F.3d 1547, 1552-55 (10th Cir. 1995)(Fourth Amendment excessive use of force, applying *Anderson*, but not "bright-line" test); *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 589-590 (6th Cir. 1994)(Fourth Amendment search and seizure case, applying *Anderson*, and referring to "bright-line" test for determining the line between investigatory detention and arrest).

Impairment of contract

In the courts below, petitioners contended (1) the applicable law was not clearly established, because the right to receive benefits applied only to "retired" members of the judiciary, and Mr. Larsen was not "retired" [A12]; (2) that petitioners could have believed their revocation of Mr. Larsen's medical benefits was lawful under the 1993 amendment of Article V, § 16(b) [A14]; and, (3) the law was not clearly established that retirement medical benefits were

to be treated in the same manner as other forms of retirement benefits [A20].

The 1993 amendment to Article V, § 16(b) of the Pennsylvania Constitution of 1968, does not apply to Mr. Larsen because § 16(b) became effective (on August 18, 1993) *after* Mr. Larsen's rights had vested on about December 12, 1989, when the Pennsylvania Supreme Court adopted a new medical insurance plan providing lifetime retirement benefits for members of the judiciary with 10 or more years of service, regardless of age.

As of December 12, 1989, Mr. Larsen had served as a member of the judiciary for over 10 years (since January 1974). As a result, his benefits vested as of December 12, 1989, and he was entitled to "Fully State-Paid Basic & Specialized Coverage" for life upon separation from the judiciary.

The 1993 amendment to § 16(b) also superseded Article V, § 18(h), which said that upon removal or suspension of a justice from office, "his *salary* shall cease from the date of such order." Thus, before the 1993 amendment, the Pa. Constitution had no provision that *deferred compensation* would not be paid.

It was clearly established as of June 17, 1994, that states do not have power to impair the obligations of parties to a contract, including a contract between a state and a citizen.

Article I, § 10, clause 1, of the U.S. Constitution, says:

"No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

Inquiry under the Contract Clause is whether (a) there is

a contractual relationship, (b) a change in the law that impairs that relationship, and (c) the impairment is substantial. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 244-45 (1978).

The Contract Clause limits the power of states to modify their own contracts. *See*, *Fisk v. Police Jury of Jefferson*, 116 U.S. 131 (1885); *Houston & Texas RR. v. Texas*, 177 U.S. 66, 99-101 (1900); *Mississippi v. Miller*, 276 U.S. 174 (1928)(constitutional protection extends to retroactive application of law that would take from state official an amount he had theretofore earned); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938)(repeal of teachers tenure law operates as impairment of teacher's contract with state); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977); *Ass'n of Pa. State College & Faculties v. State System of Higher Education*, 505 Pa. 369, 479 A.2d 962 (1984); *accord*, *Rhode Island Nat. Ed. Assoc. v. Retirement Board*, 890 F.Supp. 1143, 1162-66 (D.R.I. 1995), citing decisions rendered before June 17, 1994.[10]

Here, there are no questions (a) of a contractual relationship between Pennsylvania and Mr. Larsen; (b) that application of the 1993 amendment, Art. V, § 16(b), to Mr. Larsen, would impair that relationship by revoking Mr. Larsen's right to deferred compensation for services already rendered, in the form of retirement medical benefits; and, (c) that the impairment is substantial.

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[10]*Dodge v. Bd. of Ed. of Chicago*, 302 U.S. 74 (1937), seems to be on point, but, in fact, is not. *Dodge* affirmed an Illinois statute that decreased the amounts of annuity payments to retired teachers, on the ground that the statute did not create any contractual or vested rights, but rather, was a declaration of legislative policy, under which payments made were gratuities.

General principles of entitlement to retirement benefits

Pennsylvania has long recognized that the right to receive retirement benefits is contractual because "retirement provisions for public employees is that of deferred compensation for service actually rendered in the past. *Bellomini v. State Retirement Board*, 498 Pa. 204, 445 A.2d 737, 739 (1982); *McKenna v. State Employees Retirement Bd*, 495 Pa. 324, 433 A.2d 871, 877 (1981); *Harvey v. Allegheny County Retirement Board*, 392 Pa. 421, 141 A.2d 197, 203 (1958); *Wright v. Allegheny County Retirement Bd*, 390 Pa. 75, 134 A.2d 231, 233 (1957); *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165, 97 A.2d 231 (1953); *McBride v. Allegheny County Retirement Board*, 330 Pa. 402, 199 A. 130 (1938); *Retirement Board of Allegheny County v. McGovern*, 316 Pa 161, 174 A. 400 (1934)." *Zimmerman v. Officers & Employees Retirement Board*, 501 Pa. 293, 461 A.2d 593, 595 (1983). Petitioner Nix authored *Zimmerman*.

It was clearly established in Pennsylvania as of June 17, 1994, that when a state employee's rights to retirement benefits are vested, he is unaffected by subsequent changes in legislation changing the terms of the retirement contract. *Bellomini, supra*, 445 A.2d at 739.

It was clearly established in Pennsylvania as of June 17, 1994, that where a public employee's right to receive benefits has vested, any attempt later to interfere with that right constitutes an unconstitutional impairment of contract. *Harper v. State Employees Retirement System*, 154 Pa.Cmwlth. 573, 624 A.2d 279 (1993), affirmed, 538 Pa. 520, 649 A.2d 643, 645 n.4 (1994); *Ass'n of Pa. State College & Faculties v. State System of Higher Education*, 505 Pa. 369, 479 A.2d 962, 965 (1984); *Harvey, supra*, 141 A.2d at 203.

State College, supra, held that legislation ("§ 7") requiring state employees, who were members of the retirement system before the legislation went into effect, to make an additional wage contribution of 1.25% to the retirement system, impaired the contract rights of all members of the system:

> "It has long been recognized in Pennsylvania that the nature of the retirement provisions for public employees is that of deferred compensation for service actually rendered in the past. [citations omitted].
>
> "Since § 7 reduces the value of members' retirement benefits, it is unquestionably a unilateral modification in the System adverse to its members and is void as applied to employees whose contractual rights were vested prior to its enactment."

Petitioner Nix authored *State College* and was joined by petitioners Flaherty, Zappala and Papadakos.

Harper, supra, held that legislators who took office before a statutory change in pension benefits were permitted to retain their pension status, in order to avoid an unconstitutional impairment of contract. Only legislators who took office after the change received the new reduced benefits package.

Harvey, supra, held an employee who has complied with all conditions necessary to receive a retirement allowance cannot be affected adversely by subsequent legislation which changes the terms of the retirement contract.

It was clearly established in Pennsylvania as of June 17, 1994, that "vesting" of public retirement benefits occurs when an employee has made all required contributions and has completed the number of years of service required for

eligibility. *Police Pension Fund v. Hess*, 127 Pa.Cmwlth. 498, 562 A.2d 391, 395 (1989), citing *Hickey v. Pittsburgh Pension Bd*, 378 Pa. 300, 106 A.2d 233 (1954).

Principles applied to Pa. judiciary

"Retirement benefits are not a gratuity; they are deferred compensation and should be viewed as such. To change the terms by which retirement benefits are calculated strikes at the heart of the compensation package." *McKenna, supra*, 433 A.2d at 877 (petitioner Flaherty).

It had been clearly established in Pennsylvania as of June 17, 1994, that "retirement benefits," including pension benefits, "are founded upon a contract theory of deferred compensation." *Glancey v. Com. State Retirement Bd*, 530 Pa. 520, 610 A.2d 15, 22-23 n.16 (1992). "Loss of retirement benefits, particularly where an individual has invested many years of service on the bench, is a serious matter. It strips an individual of his or her expectation in remuneration for services already performed." 610 A.2d at 25. Petitioner Cappy authored the majority opinion in *Glancey* and was joined by petitioners Nix, Flaherty, Zappala and Papadakos.

Glancey, supra, decided May 18, 1992, held that judges removed from office for disciplinary reasons (pursuant to the former constitutional procedures involving the Judicial Inquiry and Review Board and Supreme Court), did not forfeit their pension benefits by operation of (former) Art. V, §§ 16(b) and 18(h), prohibiting compensation to judges removed from office, because "compensation," within the meaning of (former) § 16(b), did not include pensions or

retirement benefits, but only "salary."[11]

A reading of the Pennsylvania retirement cases clearly shows that there are two kinds of retirement benefits: (a) pension benefits and (b) medical and health benefits. Both kinds of benefits are governed by the same legal principles. For examples, see *Snyder and Shiomos v. Administrative Office of Pa. Courts*, 132 Pa.Cmwlth. 382, 572 A.2d 1313 (1990)(decision as to retirement medical benefits), and *Snyder and Shiomos v. State Retirement Board*, 128 Pa.Cmwlth. 100, 562 A.2d 1000 (1989)(decision as to retirement pension benefits); *Shiomos v. State Retirement Board*, 533 Pa. 588, 626 A.2d 158, 159 n.4, 160 n.7 (1993)(in opinion authored by petitioner Cappy and joined by petitioners Nix, Flaherty and Zappala, equated forfeiture of pension benefits with forfeiture of medical benefits and affirmed Commonwealth Court's reversal of the actions of the Employees Retirement Board and the Administrative Office); *Bellomini, supra*.

By revoking Mr. Larsen's rights to receive lifetime medical benefits after leaving office, petitioners applied § 16(b) to work a forfeiture of compensation for service Mr. Larsen had already rendered to Pennsylvania.

Although the Third Circuit correctly rejected the contention of petitioners that "it was not clearly established

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[11] *Glancey* involved actions known as the "roofers union cases," where numerous judges were removed from office by the Supreme Court of Pennsylvania for receiving cash ("gifts under the table"). Such removals were considered involuntary retirement. These judges were denied their pensions and medical benefits and appealed to Commonwealth Court of Pa., which affirmed the denial of benefits. The Supreme Court reversed, and these judges are now receiving their pension and medical benefits.

that retirement medical benefits were to be treated in the same manner as other forms of retirement benefits," the Third Circuit was incorrect in saying that the Supreme Court of Pennsylvania "had not applied [the rule that a retirement benefit is a form of deferred compensation] in the precise context of medical benefits" [A20-21, n.13].

It was clearly established in Pennsylvania as of June 17, 1994, that the right to receive medical benefits is a form of deferred compensation which, upon vesting, gives rise to unalterable contractual rights, that is, lifetime medical coverage is a retirement benefit. *Bellomini, supra*, 445 A.2d at 738; *Snyder and Shiomos v. Administrative Office of Pa. Courts, supra*; *Snyder and Shiomos v. State Retirement Board, supra*; *Shiomos v. State Retirement Board*, 533 Pa. 588, 626 A.2d 158, 159 n.4, 160 n.7 (1993).

Snyder and Shiomos considered lifetime medical insurance coverage to be a retirement benefit.[12] *Glancey, supra*, 610 A.2d at 31 (Nix, C.J., dissenting), said compensation includes medical benefits and retirement funds.

Bellomini, supra, was decided under the Pennsylvania Public Employee Pension Forfeiture Act, 43 P.S. § 1313 ("Forfeiture Act"), involved separate cancellation of pension benefits and medical benefits, and considered health insurance to be a retirement benefit. Employees of the Administrative Office (petitioners herein), notified Cianfrani that since his retirement pension benefits had been terminated by the State Employees Retirement Board, pursuant to the Forfeiture Act, his retirement medical benefits were also being cancelled. The Supreme Court affirmed the Commonwealth Court's

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[12]*Snyder and Shiomos* were reversed and remanded on other grounds, 533 Pa. 269, 621 A.2d 563 (1993), for reconsideration in light of *Glancey*.

reversal of the actions of the Pension Board and the Administrative Office, and thus, reinstated both the pension benefits and the medical benefits to which Bellomini was entitled. "Comprehensive lifetime healthcare coverage" is a retirement benefit (Roberts, J., dissenting but undisputed, 445 A.2d at 742).

The Forfeiture Act applies to both retirement pension benefits and to retirement medical benefits. 43 P.S. § 1313.

Pennsylvania cases dealing with pensions use the terms "pensions" and "retirement benefits" interchangeably. And if any one retirement benefit is granted, then all benefits are granted, including medical benefits. For example, see *Bellomini* and *Shiomos*, *supra*.

It was clearly established in Pennsylvania as of June 17, 1994, that public employees, including the judiciary, could be disqualified from receiving benefits under the Forfeiture Act, *only* if convicted of one of 22 enumerated crimes in the Forfeiture Act (§ 1312). *Shiomos*, *supra*; *Miller v. Commonwealth*, 498 Pa. 103, 445 A.2d 88 (1981); *Burello v. State Employees Retirement System*, 49 Pa.Cmwlth. 364, 411 A.2d 852 (1980). Mr. Larsen was not charged with or convicted of committing any of these 22 enumerated crimes.

Miller, *supra*, declared retroactive applications of the Forfeiture Act to be unconstitutional.

Burello, *supra*, found that retirement benefits constitute a property right; invalidated that part of the Forfeiture Act (§ 7), which made the act, effective July 8, 1978, retroactive to December 1, 1972; and, held the Forfeiture Act provision requiring retroactive forfeiture of pension benefits for conviction of a crime (limited to 22 enumerated crimes) related to public office effected an impairment of contract

obligation under the Contract Clause, and was also unconstitutional as an *ex post facto* law, in that § 7 renders an act punishable in a manner in which the act was not punishable when committed.

Zimmerman, supra, held that the Forfeiture Act cannot be applied retroactively to a member of the State Employees Retirement System whose pension had vested before adoption of the Forfeiture Act, because such application results in an impairment of contract; and, that the Forfeiture Act does not apply to acts committed before its adoption.

Zimmerman was applied in *Shiomos*, 626 A.2d at 161-162, and *Apgar v. State Employees Retirement System*, 655 A.2d 185, 187-188 (Pa.Cmwlth. 1994), that passage of the Forfeiture Act was a unilateral action affecting an employee's contractual right to receive his pension, and as such, could not alter the terms of the existing pension contract. The Forfeiture Act was applied to former Judge Shiomos and Ms. Apgar because of changes in their employment after the effective date of the Forfeiture Act: Judge Shiomos assumed a second term of office and Ms. Apgar was promoted to a new position. Thus, new contracts were created between the parties, which incorporated the Forfeiture Act.

Article V, § 16(b), must be construed and applied in accordance with the caselaw applying the Forfeiture Act. Under such authorities. enactment of § 16(b) was a unilateral action affecting Mr. Larsen's contractual right to receive his retirement benefits, and as such, could not alter the terms of his then-existing retirement contract. Mr. Larsen's situation is unlike former Judge Shiomos and Ms. Apgar because he did not have any change of employment after § 16(b) was adopted (5/18/93) or became effective (8/18/93). Mr. Larsen was then in the middle of one of his ten-year terms (which began in January 1988), and thus, no new contract had been

created which could have incorporated the 1993 § 16(b) amendment into Mr. Larsen's employment contract.

Indeed, the Supreme Court of Pennsylvania, by action of petitioners Nix, Flaherty, Papadakos, Zappala, Cappy and Montemuro, specifically rejected the concept that the 1993 § 16(b) amendment applied to then Justice Larsen, because when petitioners suspended Mr. Larsen on October 28, 1993, they continued to pay him his full salary and to provide him with his full medical and health benefits, contrary to the 1993 § 16(b) amendment.

Moreover, all conduct that Mr. Larsen was criminally charged with or convicted of, and the conduct alleged in the seven Articles of Impeachment, occurred *before* the amendment of Article V, § 16(b), August 18, 1993.

Accordingly, in light of the clearly established law of the highest court in Pennsylvania, petitioners, as reasonable Supreme Court justices and court administrators, knew or should have known, that their June 17, 1994, revocation of Mr. Larsen's right to lifetime medical benefits, which right had vested as of December 12, 1989, was an impairment of the contract between Mr. Larsen and Pennsylvania, and thus was a violation of his right to such benefits.

The failure of the justices to follow clearly established law is particularly egregious, since it is the law of their court that they did not follow. Five of the seven justices, now petitioners, participated in creating the law of the inviolate nature of the vesting of all retirement benefits.

Due process

Petitioners revoked Mr. Larsen's benefits without notice and without a pre or post-revocation hearing.

It was clearly established as the law of the United States as of June 17, 1994, that contractual rights are property interests under the Due Process Clause of the Fourteenth Amendment. *U.S. Trust Co. v. New Jersey, supra*, 431 U.S. at 19 n.16 (contract rights, like a professional license, are a form of property); *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974); *Fleming v. Nestor*, 363 U.S. 603, 610-11, 80 S.Ct. 1367, 1372-73 (1960)(plaintiff had reasonable expectation of receiving pension benefits).

It was clearly established in Pennsylvania as of June 17, 1994, that contract rights are a form of property, and as such cannot be taken without due process of law. *Lyness v. State Bd. of Medicine*, 529 Pa. 535, 605 A.2d 1204, 1207 (1992) (revoking professional license triggers protective mechanism of procedural due process, which includes notice and hearing).

Mr. Larsen's retirement benefits are property within the meaning of the Due Process Clause of the Fourteenth Amendment. Due process contemplates a state not abrogating its obligations. *Lyness*; *Schware v. N.M. Bd. of Bar Ex.*, 353 U.S. 232, 77 S.Ct. 752, 760 (1957); *Rhode Island Nat. Ed. Assoc.*, *supra*. Property may be taken for a public purpose, but only if notice is given, a hearing is provided, and just compensation is paid. Mr. Larsen did not receive notice, did not have a hearing, and did not receive just compensation, on the state's revocation of his retirement benefits.

The Third Circuit held that because Mr. Larsen "had a property interest in his medical benefits he was entitled to

some sort of hearing with respect to their termination" [A22]. Petitioners conceded in the court of appeals, that if Mr. Larsen had a property interest, he was entitled to some sort of hearing [A22].

Petitioners' contention (p. 15) that no post-conviction (criminal) hearing is required to deprive an individual of a property or liberty interest is a *non sequitur*. Revocation of Mr. Larsen's retirement medical benefits was not a result of a criminal conviction. Citations to and explanations of 18 Pa.C.S.A. § 6105, 25 P.S. § 961.501 and 18 U.S.C. § 921(g), are confusing, misleading, irrelevant and incorrect. These rights are not contractual rights. Neither Pennsylvania statute is applicable to Mr. Larsen.

First Amendment

The First Amendment, applicable to the states through the Fourteenth Amendment, says in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Applicable First Amendment jurisprudence was well established in Pennsylvania as of June 17, 1994.

To state a claim of retaliation in violation of First Amendment rights, plaintiff must show he was engaged in an activity protected by the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Plaintiff must also show the activity in question was a substantial factor motivating the government's alleged retaliatory action. *Mt. Healthy v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 575-76 (1977).

It was clearly established as of June 17, 1994, that the First Amendment gives individuals the right to petition the government for redress, considered a form of speech.

It was clearly established as of June 17, 1994, that the First Amendment protects individuals against retaliation for exercising their rights to petition the government, as a form of protecting speech.

It was clearly established as of June 17, 1994, that the First Amendment protects the rights of high state officers to free speech. *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339 (1966). *Bond* said the central commitment of the First Amendment is that "debate on public issues should be uninhibited, robust, and wide-open," 87 S.Ct. at 349, citing *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964).

Paragraphs 1 - 125 of the amended complaint [A108-A137] were incorporated in the First Amendment retaliation count against petitioners. See specifically, ¶¶ 21-24 of the amended complaint [A112-A115].

The amended complaint alleges the real reasons petitioners retaliated against Mr. Larsen were the statements in his petitions alleging misconduct of his fellow justices, including "impropriety by Chief Justice Nix in interfering in a pending trial in Lehigh County, Commonwealth v. David Lee Yohn, and in the Supreme Court's handling of Yohn's petition for allowance of appeal [A112]" and "that despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken or charges made against Chief Justice Nix [A113]."

Crawford-El declined to adopt heightened pleading standards.

Mr. Larsen's allegations are more than "bare allegations of malice" as petitioners contend (pp. 17-19).

Conclusion

Petitioners are not entitled to qualified immunity under the "clearly established" standard of any circuit. As of June 17, 1994, the contours of the rights under U.S. and Pennsylvania law were clear, and petitioners, as reasonable officials, knew or should have known that revoking Mr. Larsen's retirement medical benefits violated those rights. Petitioner-justices participated in writing the Pennsylvania case law that established such rights; petitioner-officials of the Administrative Office were parties to litigation that helped create such case law.

Respondent Rolf Larsen asks the court to deny the petition of petitioners Nix, et al., for a writ of certiorari to review the August 11, 1998, decision of the court of appeals.

Respectfully submitted,

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